

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBM 51 OF 2023

IN THE MATTER OF JUYOUNG HEO, a minor by, **SUNYOUNG JUNG**, his next friend.

IN THE MATTER OF, an application for Writ of Habeas Corpus ad-Subjciendum.

BETWEEN : **JUYOUNG HEO** a minor by, **SUNYOUNG JUNG** of Lot 11 Wainidova Road, Navua, Fiji, presently based at Grace Road Farm, Vitogo, Lautoka, Investor, his next friend.
PLAINTIFF

AND : **THE DIRECTOR OF IMMIGRATION** of Fiji Immigration Department, 969 Howell Road, Suva.
1ST DEFENDANT

AND : **THE COMMISSIONER OF FIJI POLICE** of Fiji Police Force Headquarter, Vinod Patel Building, Ratu Dovi Road, Suva, Fiji.
2ND DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI AND FOR THE REPUBLIC OF THE FIJI ISLANDS**
3RD DEFENDANT

BEFORE : Hon. Justice Mohamed Mackie

APPEARANCES : Mr. W. Pillay, for the Plaintiff
Mr. Green R. Hon. Solicitor General, with Ms. Solimailagi & Mr. S. Kant, for the Defendants

WRITTEN SUBMISSIONS: Filed on 19th December by the Defendants

HEARING : 27th November, 2023.

DATE OF DECISION : 29th February, 2024.

RULING

A. INTRODUCTION:

1. Before me is a Notice of Motion filed by the Plaintiff on 3rd November 2023 and supported on ex-parte basis, seeking the following Orders:
 1. *Forthwith a Writ of Habeas Corpus Ad Subjiciendum be issued against;*
 - A. *The Director of Immigration Fiji and/or*
 - B. *The Commissioner of Fiji Police and/or*
 - C. *Other person(s) having custody of JUYOUNG HEO (a minor)*
 2. *Further and/or in the alternative, the Court to make such further or other orders under Order 54 Rule 2 of the High court Rules 1988.*
 3. *An interim injunction restraining the Director of Immigration Fiji and/or Commissioner of Fiji Police and/or Airports Fiji Limited and/or Civil Aviation Authority of Fiji and/or Air Pacific Limited and/or Fiji Airways and/or Air terminal Services of Fiji and/or their officers, employees, servants, agent and/or workmen and/or such other person entitles and/or Government Institutions from removing and or causing to remove and/or assisting in the removal of JUYOUNG HEO (a minor) from Fiji and/or the jurisdiction of Fiji and/or beyond the borders of Fiji in and/or by aircraft, vessel, ship and/or by any means, form, method and/or manner whatsoever until further order of Court and/or until the return of Writ of Habeas Corpus Ad-Subjiciendum.*
 4. *Costs of this application be paid by the Defendants jointly or severally as the Honorable court may determine; and*
 5. *Such other order(s) or further orders that the Court deem just, equitable, expedient and necessary in the circumstances.*
2. The Plaintiff hereof SUNYOUNG JUNG is the mother of JUYOUNG HEO, who is a Minor and alleged to have been unlawfully arrested and detained by the First and/or the Second Defendant at an unknown place.
3. The Affidavit in support sworn by the Plaintiff **SUNYOUNG JUNG** on 3rd November 2023 was filed along with annexures marked as “SJ-1” to “SJ -4” being the part and parcel thereof. The Plaintiff states that JUYOUNG HEO is unable to depose this Affidavit due to his unlawful arrest and detention at an unknown place.
4. This Application is said to have been filed pursuant to Order 54 and 29 of the High Court Rules 1988, the Constitution of the Republic of Fiji and the inherent and unlimited jurisdiction of the High Court of Fiji.
5. This Court, on 3rd November 2023, having heard the learned Counsel for the Plaintiff in support of the Application on Ex-parte basis, granted only the relief 1 prayed for in the Notice of Motion. The relief of an Interim Injunction order prayed for as per prayer 3 of the Notice of Motion was reserved to be considered inter-parte, as the

Court was not inclined to grant the same on ex-parte basis. The Orders granted were sealed and, reportedly, served on the Defendants.

6. In addition to the aforesaid initial Affidavit in Support, the following Affidavits were also filed by the Plaintiff (without an Order from Court) in support of her application;
 - a. An affidavit in Support sworn by the Plaintiff **SUNYOUNG JUNG** and filed on 9th November 2023 along with number of annexures marked as “SJ-01”.
 - b. An affidavit in Support sworn by the Plaintiff **SUNYOUNG JUNG** on 14th November 2023 and filed on 16th November 2023, along with number of annexures marked as “SJ-01” and “SJ-2”, which were 2 emails.
 - c. A supplementary Affidavit sworn by the Plaintiff **SUNYOUNG JUNG** and filed on 22nd November 2023, along with an annexure marked as “SJ-1”.
7. On behalf of the Defendants, the Director of Immigration filed a RETURN, along with the following Affidavits, on 10th November 2023.
 - a. An affidavit in opposition sworn by AMELIA **KOTOBALAVU KOMAISAVAI**, Director of Immigration on 9th November 2023 and filed on 10th November 2023, along with annexures marked as “AKK-1” to “AKK-2”.
 - b. An affidavit by **JONE VOLAUTAWA VUKAYAWA RUSIVAKULA**, Acting Senior Immigration Officer - Compliance and Investigation of Fiji Immigration Department, sworn on 9th November 2023 and filed on 10th November 2023 in support of the Affidavit in opposition filed by the Defendants.
 - c. An affidavit by JUYOUNG **HEO**, (the Minor alleged to be in detention) sworn on 9th November 2023 and filed on 10th November 2023 in support of the Affidavit in opposition filed by the Defendants.
 - d. An affidavit by **CHANGWON HEO**, the Father of the Minor JUYOUNG HEO, sworn on 9th November 2023 and filed on 10th November 2023, along with an annexure marked as “CH-1” being the “Certificate of Family Relations”, in support of the Affidavit in opposition filed by the Defendants.
 - e. An affidavit by **ROSINIMALEYA VULIVAKARUA**, Acting Manager Compliance & Investigation of the Department of Immigration, sworn on 9th November 2023 and filed on 10th November 2023, along with annexures marked as “RV-1” in support of the Affidavit in opposition.
8. In the meantime, on 11th November 2023 a SUMMONS TO STRIKE OUT was filed by the Defendants pursuant to Order 18 rule 18 (1) (a) of the High Court Rules 1988, and under the inherent jurisdiction of this Court, seeking to have the Plaintiff’s Notice of Motion for Writ of Habeas Corpus ad-Subjciendum struck out and for Costs.

9. When the matter came up on 16th November 2023, with all the Affidavits being filed, except for the Plaintiff's Supplementary Affidavit, as both the counsel had no free dates to fix the hearing in the year 2023, the matter was fixed to be mentioned on 27th November 2023 in order to fix an early date for hearing in January 2024.
10. However, when the matter came up on 27th November 2023, as both the Senior counsel were present in Court, with the agreement of both the Counsel, the Court decided to go into the Striking Out Application preferred by the Defendants and after hearing both the Counsel, left the parties at liberty to file written submissions.
11. Learned Solicitor General, Counsel for the Defendants, in his oral and written submissions, having addressed the Court on the Striking out Application, also made submissions on the RETURN, if the Court is minded to make determination on the merits of the Habeas Corpus Application and dwell on the validity of the arrest and detention alleged by the Plaintiff.

B. APPLICATION FOR STRIKE OUT:

12. The Striking out Application has been preferred on behalf of the Defendants pursuant to Order 18 Rule 18 (1) (a) of the High Court Rule 1988 seeking for the following Orders;

1) ***THAT*** the Plaintiff's Writ of Habeas Corpus ad-Subjiciendum be struck out under Order 18 Rule 18 (1) (a) of the High Court Rules 1988, and under the inherent jurisdiction of this Honorable Court as it discloses no reasonable cause of action.

2) ***AND FOR FURTHER ORDER*** that the costs of this Application be paid by the Plaintiff.

3) ***ANY FURTHER*** order or other relief that this Honorable Court deems just and equitable in the circumstances.

C. HEARING:

13. At the hearing held on 27th November 2023, learned Counsel for both the parties were heard making their respective oral submissions. In addition to above, written submission was filed on behalf of the Defendants on 19th December 2023. Though, the Plaintiff's Counsel was left at liberty to file their written submissions, no such submissions have so far been filed.
14. The Plaintiff, for her substantial Application, has relied on three (3) Affidavits in support and on a supplementary Affidavit, all sworn and filed by her as referred to in paragraph 6 above. The Defendants did not file an Affidavit in support of his Striking Out Application, as they were not supposed to do so since the Application was made pursuant to Order 18 Rule 18 (1) (a). However, the first Defendant has caused to be filed an affidavit in opposition and few other supporting affidavits thereto as referred to in paragraph 7 above, to oppose the substantial Application of the Plaintiff.

D. THE LAW ON STRIKING OUT:

15. Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules, which reads as follows;

18. – (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a). (Emphasis added)

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

*“It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in *Hubbuck v Wilkinson* (1899) 1 Q.B. 86, p91 *Mayor, etc., of the City of London v Homer* (1914) 111 L.T. 512, CA). See also *Kemsley v Foot and Qrs* (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable “ (Att – Gen of *Duchy of Lancaster v L. & N.W. Ry Co* (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per *Danckwerts and Salmon L.JJ in Nagle v Feliden* (1966) 2. Q.B 633, pp 648, 651, applied in *Drummond Jackson v British Medical Association* (1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .*

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

*“On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (*Wenlock v Moloney*) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).*

*It has been said that the Court will not permit a plaintiff to be “driven from the judgment seat” except where the cause of action is obviously bad and almost incontestably bad (per *Fletcher Moulton L.J. in Dyson v Att. – Gen* [1910] UK Law Rp KQB 203; [1911] 1 KB 410 p. 419).”*

16. In the case of **Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641**, it was held;

“The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion; the Plaintiff’s case must be so clearly untenable that it could not possibly succeed and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct”

17. In the case of **National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000)**, it was held;

“The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court”.

18. In **Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010)**, Master **Tuilevuka** (as he was then) summarized the law in this area as follows;

“The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267.”

19. In **Paulo Malo Radrodro v Sione Hatu Tiakia & others, HBS 204 of 2005**, the Court stated that:

“The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

*A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in **Drummond Jackson v British Medical Association [1970] WLR 688**.*

The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly, is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case”.

“The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed – ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238” – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.

E. DISCUSSION:

20. The prime question that arises for consideration now is, whether this Court at the outset on 3rd November 2023 should have issued the Order 1, namely, a Writ of **Habeas Corpus Ad Subjiciendum** against the Defendants *in* terms of the Ex-parte Notice of Motion, in view of the facts revealed by the Plaintiff herself in her subsequent affidavits in Support filed on 9th and 16th November 2023 and the Supplementary affidavit filed on 22nd November 2023.
21. It has been revealed that the Minor in question JUYOUNG HEO had been a subject in the Divorce proceeding between the Plaintiff and her Husband CHANGWON HEO, in the Republic of Korea, wherein the Custody of the said Minor was granted to the Plaintiff in August 2015 , with further orders as to the maintenance and the access to the Minor for his Father CHANGWON HEO, the Defendant thereof. It is not clear as to how the Minor was brought to Fiji by the Plaintiff and the Court Order for Father’s access to the Minor, as per the said Order, was observed without any breach.
22. It may be a matter of concern for the very Court which made the relevant Order or for a Court in Fiji in an appropriate proceeding. But the above facts, along with the other facts revealed in the Plaintiff’s further Affidavits in Support and supplementary affidavit, strongly suggest that the status quo of the Minor had remained as an unsettled issue and the minor himself was unhappy about his new atmosphere and the living conditions in the farm allegedly, having to work there, with no pay and sufficient time to rest.
23. Nothing is mentioned by the Plaintiff in her affidavits about the steps taken by her for Minor’s studies and other welfare activities when he was, allegedly, engaged in lengthy working hours, which in my view, may have contributed for his separation and running away from the Plaintiff Mother, causing her to file this type of application to stop him from leaving the Fiji and joining with his Father.
24. It is observed from further revelations that thought the Minor, who was brought into Fiji by the Plaintiff Mother to keep him under her close care and custody by giving preference to his education and wellbeing, it is revealed most of the times he was away from the Plaintiff Mother and working at various places of the Farm, where the mother is said to be a co-investor. Though, this Court is not supposed to go into these affairs to arrive at any findings on those allegations, it is an undisputed fact that the Minor and the Plaintiff were at loggerheads for a long period of time. They have, admittedly, met or seen each other only at the church service only at few instance

and the gap between them also appears to have widened with the passage of time, while he was nearing his age of majority.

25. It is also revealed that the Minor had, on two occasions in 2023, attempted to escape from the Farm and the grip of his mother and though he failed in those attempts, he had spent time away from his mother and farm, allegedly, in a relationship with a married woman, who also said to be a worker at the Farm where the Minor worked. The allegation of illicit relationship and other bad habits, including smoking etc. of the Minor were revealed by none other than the very Mother, the Plaintiff, in her further Affidavits in support. Those allegations immensely demonstrate the extent of animosity existed between them.
26. The fact that the minor **did not wish to see his mother**, when he was with the immigration officers, after the alleged arrest, as averred by her in her Affidavit in support, is substantiated by the Affidavit sworn by the minor who is 17 years of age and filed as a supporting Affidavit to first Defendant's Affidavit in opposition.
27. The minor with his undisputed capacity to swear, through his said Affidavit has given a brief account about his separation from his mother immediately after arriving at Fiji, taking of his passport from him, his working history, his tainted relationship with the Plaintiff Mother, the alleged ordeal he had to undergo at the farm and about his 2 previous attempts to escape all of which remain unchallenged. He further states that finally on the fateful day of 30th October 2023 he surrendered to the immigration officers by getting into their vehicle on his own volition and he felt safe and happy at the place provided by them.
28. The Father of the Minor, who is the former husband of the Plaintiff, too has given an Affidavit in support of the Affidavit in opposition filed by the Defendants. He has given the details of his arrival at Fiji, being informed by the Korean Embassy, about his stay with his Son at the safehouse provided to them, about obtaining the new Travel documents for him and about their return back to Korea as per the wishes of his son.
29. The first Defendant's Affidavit in opposition is also supported by the Affidavits of the Officers of the first Defendant's office, particularly that of the very Officers who participated at the investigation process on 30th October 2023, which reveals that there was no such an arrest or detention as averred and alleged by the Plaintiff.
30. The Plaintiff has not adduced even an iota of evidence to substantiate that there was a need for the arrest, detention and deportation of the minor by the Defendants on account of any commission or omission on his part. The Plaintiff is not assisted by even a single witness, who the Plaintiff claimed were present at the time and place of the alleged arrest. Even the Plaintiff contradicts her own evidence about her absence at the time and place of the alleged arrest.


31. The Defendants are not bound to adduce any evidence in support when a striking out Application is brought under Order 18 Rule 18 (1) (a) of the High court Rule 1988. However, the very evidence adduced by the Plaintiff herself in her Affidavits in support, particularly in the subsequent Affidavit in supports filed on 16th November 2023, clearly demonstrate that the events unfolded from the inception were not good and sufficient enough to have a cause of action accrued against the Defendants in her favor to warrant the exercise of the writ jurisdiction of this Court pursuant to Order 54 Rule (2) of the High Court Rules 1988.
32. The Plaintiff has failed to establish that there was a need for the Defendants to arrest the Minor hereof, for his detention and deportation as alleged by her. The Minor has left Fiji with his father as confirmed by the plaintiff by her supplementary Affidavit, without being wanted or prosecuted by the Defendants for any wrongdoing.
33. The Plaintiff appears to be having issues in relation to her parenting, safe keeping and upbringing of the minor and has finally lost her control over him for reason not fully known to this Court. However, the exercise of the writ jurisdiction of this court against the Defendants, with no solid basis, is not warranted. In other words, the Plaintiff has not shown to this Court that she has a reasonable cause of action against the Defendants for this Court to assist her by exercising its writ jurisdiction pursuant to Order 54 of the High Court Rule 1988.
34. As I intimated at the inter-parte hearing, had this Court been privy to the subsequent revelations made by the Plaintiff's further Affidavits in Support filed on the 9th and 16th November 2023, a different picture would have been painted on the day the application was supported, and this Court on 3rd November 2023 would, probably, have abstained from making the Order 1 as per the Ex-parte Notice of Motion.
35. The plaintiff also seeks an injunction restraining the Director of Immigration, Commissioner of Fiji Police, Airports Fiji Limited, Civil Aviation Authority of Fiji, Air Pacific Limited, Fiji Airways, Air Terminal Services of Fiji and Government Institutions from removing and or causing to remove and/or assisting in the removal of the minor.
36. As the Plaintiff's Application fails for want of cause of action as stated above, no relief by way of injunction could be favorably considered. Accordingly, the relief of injunction as prayed for in paragraph 3 of the Motion also has to be declined.
37. Accordingly, this Court arrives at the final decision that the plaintiff's Application for Habeas corpus Ad- Subjiciendum, together with injunctive orders, should be struck out pursuant to Order 18 Rule 18 (1) (a) of the High court Rule 1988.
38. As the Plaintiff had purposely withheld and/ or suppressed the material facts at the very first day of her Application to this Court, and caused this unwarranted Order 1 to be issued against the Defendants, I am of the view that the Plaintiff should be ordered to pay the first Defendant a sum of \$3,000.00 (Three Thousand Fijian

Dollars) being the summarily assessed costs to be paid and settled within 14 days from the date of this Ruling.

F. FINAL ORDERS:

- a. The Defendants' Application for Strike Out succeeds.
- b. The Plaintiff's Application dated 3rd November 2023 is hereby struck out.
- c. The Plaintiff shall pay the First Defendant a sum of \$3,000.00, being the summarily assessed costs, within 14 days from today.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 29th day of February, 2024.

SOLICITORS:

For the Applicants:

Gordon & Co., Barrister and Solicitor

For the Defendants:

Office of the Attorney-General*